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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 251

PANHANDLE EASTERN PIPE LINE COMPANY, A CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinions and accompanying orders of the Commission under review (App. C, 85-92, 113-158, and 179-201) [1] are reported in 67 P.U.R. (N.S.)

[1] The court below heard the case without requiring that the transcript of the proceedings before the Commission (12,000 pages of testimony and more than 500 exhibits) be printed. This transcript has not been printed for this Court. Instead petitioner has filed (Pet. 45), a motion to dispense with the printing of the record for the purposes of the petition, which motion the Commission does not oppose in the interest of expeditious disposition of the petition. The opinion of the court has been printed as Appendix A to the Petition, (App. A) and the various pertinent orders and opinions of the Commission have been printed as Appendix C (App. C).

427 and 69 P. U. R. (N. S.) 328. The opinion of the Court of Appeals (App. A, 50-55) is not yet officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on June 3, 1948 (Tr. 26192). The petition for writ of certiorari was filed on August 30, 1948. The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act and under Section 240(a) of the Judicial Code, as amended (now 28 U.S.C. 1254).

QUESTION PRESENTED

Whether the court below properly affirmed the order of the Federal Power Commission (Commission) granting a conditional certificate of public convenience and necessity to Michigan-Wisconsin Pipe Line Company (Michigan-Wisconsin), to construct and operate a proposed natural gas pipeline in order to augment the inadequate supply of gas in the Detroit-Ann Arbor area (Detroit area), where the petitioner, Panhandle Eastern Pipe Line Company (Panhandle), at present is the sole supplier, as well as to serve new areas where substantial demand exists.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended by 56 Stat. 83 (15 U.S.C. 717 *et seq.*), are set forth in the Appendix, *infra,* pp. 27-32.

STATEMENT

Michigan-Wisconsin's Application. On September 24, 1945, Michigan-Wisconsin [2] applied to the Commission for a certificate of public convenience and necessity, pursuant to Section 7 of the Natural Gas Act, as amended, Appendix, *infra,* p. 27, authorizing it to construct and operate a natural gas pipeline from the Hugoton Gas Field in Texas to Wisconsin and Michigan (App. C, 113-114; 117-118).[3] FPC Docket No. G-669. As its main pipeline, Michigan-Wisconsin proposed to construct a 26-inch line from the Hugoton Gas Field, extending for 810 miles in a northeasterly direction to a point near Millbrook, Illinois, called Wisconsin Junction. From that point two 22-inch lines were to be built, one, 259 miles long through Indiana to the Austin Storage Field in Michigan, some 140 miles northwest of Detroit; the other, 101 miles long, was to run to a point near Milwaukee, Wisconsin, called Milwaukee Junction. From this Junction, there would be an 18-inch line to the Milwaukee area and a 14-inch line to a point near Appleton, Wisconsin, with branches from the latter to Sheboygan, Fond du Lac, Oshkosh,

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[2] Michigan-Wisconsin was organized July 20, 1945, as a wholly-owned subsidiary of American Light & Traction Company, a public utility holding company subject to the jurisdiction of the Securities and Exchange Commission by virtue of the Public Utility Holding Company Act (49 Stat. 838, 15 U.S.C. 79 *et seq.*).

[3] The application was amended on March 13 and July 22, 1946 (App. C, 113).

Manitowoc, Two Rivers, Appleton and Green Bay, Wisconsin. Additional branch lines would bring natural gas to Racine and Madison, Wisconsin, with laterals extending to Janesville, Beloit and Stoughton, Wisconsin. The branch lines serving Wisconsin were to total 422 miles. As the main line passed through Missouri, Maryville would be served, and in Iowa a lateral line was to be extended to Mt. Pleasant, Burlington, Ft. Madison and Keokuk (App. C, 117-118).

In addition to these facilities, Michigan-Wisconsin proposed to lease and operate certain facilities owned by others. These included (1) certain existing and proposed facilities owned or to be constructed by Michigan Consolidated Gas Company (Michigan Consolidated), an affiliate of Michigan-Wisconsin, to be used in the operation of the Austin and Reed City Storage fields, and certain transmission pipelines and metering stations (App. C, 119); (2) a 26-inch transmission pipeline, extending approximately 140 miles from the Austin Storage Field to a point near Detroit where the gas would be delivered into the system of Michigan Consolidated, constructed by Austin Field Pipe Line Company (Austin Company), a subsidiary of Michigan Consolidated; (3) lateral pipelines for serving the Mt. Pleasant and Ann Arbor districts of Michigan Consolidated; and (4) a transmission line connecting the Austin and Reed City fields and a compressor station in the

Austin Field constructed by Austin Company (App. C, 119-120).[4]

The effect of these various proposals was that Michigan-Wisconsin would bring natural gas into several areas in Wisconsin, Missouri and Iowa, which did not have such service, and into the Detroit area in Michigan which since 1936 had been supplied through Michigan Consolidated, the local distributing company, by Panhandle, under a contract expiring December 31, 1951. In contemplation of these facilities being authorized, Michigan Consolidated had contracted with Michigan-Wisconsin for the latter to provide its natural gas requirements after December 31, 1951; and that until that time, Michigan-Wisconsin was to furnish all of Michigan Consolidated's requirements in excess of the 127,000 Mcf per day which Panhandle was contractually obligated to furnish.

Proceedings before the Commission. Panhandle was allowed to intervene in the Michigan-Wisconsin proceedings (App. C, 228), which were subsequently consolidated[5] for the purpose of hearing with Panhandle's application (FPC Docket No. G-706), filed on March 26, 1946, for authority to expand its pipeline facilities. Prior to the intro-

[4] Michigan-Wisconsin in its application, also requested approval of the acquisition of the leased facilities on or about December 31, 1951 (App. C, 120).

[5] Thereafter a further consolidation was ordered to include hearing proceedings upon the application for a certificate as filed by Michigan Gas Storage Company in Docket No. G-731.

duction of any evidence, Panhandle moved for an immediate order dismissing Michigan-Wisconsin's application (App. C, 7). After hearing on the motion, the Commission deferred ruling thereon (App. C, 8). Hearings on the application of Michigan-Wisconsin were begun on April 16, 1946, and continued thereafter from time to time until November 13, 1946 (App. C, 8). At the conclusion of Michigan-Wisconsin's case, Panhandle, on October 25, 1946, again moved for a dismissal of the application on which ruling was deferred (App. C, 8). Following the completion of all the evidence on November 13, 1946, the hearing was recessed to November 20, 1946, for oral argument (App. C, 8). On November 19, 1946, Panhandle Eastern renewed its motion to dismiss the application of Michigan-Wisconsin (App. C, 8). Oral argument with respect to the applications of Michigan-Wisconsin and Panhandle was heard by the Commission on November 20 through 23, 1946 (Tr. 15962-16832). On November 30, 1946, the Commission, two commissioners dissenting, issued an order granting a conditional certificate to Michigan-Wisconsin (App. C, 85-92).[6]

Commission's order of November 30, 1946. In its order, the Commission found that "although it [Panhandle] has applied for and received in a

[6] The Commission at the same time denied Panhandle's motions to dismiss the application of Michigan-Wisconsin (App. C, 95-98). Simultaneously the Commission issued a certificate to Panhandle as applied for in the consolidated proceeding at Docket No. G-706, 5 FPC 949.

related case * * * authority for somewhat enlarged facilities which will enable it to increase to some extent its deliveries to said markets in Michigan, *inter alia,* it has not applied for sufficient facilities nor demonstrated its ability to serve adequately the needs of these markets in addition to the expanding requirements of those which it enjoys in the other areas which it supplies, in Indiana, Illinois and Missouri" (App. C, 86). The Commission further found that Michigan-Wisconsin "has secured substantial reserves of natural gas and has submitted reasonable proof of the financial and economic feasibility of its project * * * after all necessary approvals and consents shall have been secured" (App. C, 86). The Commission went on to find that Michigan-Wisconsin "is able and willing properly to do the acts and to perform the service proposed," and that "the proposed construction and operation of the facilities by * * * [Michigan-Wisconsin] are required by the public convenience and necessity * * *" (App. C, 87).

On the basis of these findings, the Commission authorized Michigan-Wisconsin to construct a pipeline from the Hugoton Field, Texas, to the Austin Storage Field, including only the initial compressor station and the Wisconsin pipeline and other lateral pipelines necessary to render service to the communities proposed, excepting Mt. Pleasant, Ann Arbor, and Detroit, Michigan (App. C, 88). It also authorized the operation under lease of then existing facilities in the Austin

and Reed City Storage fields owned by Michigan Consolidated (App. C, 88).[7]

Pursuant to the findings, the authority granted was subject, *inter alia,* to the following conditions: (1) that Michigan-Wisconsin should obtain approval of its proposed plan of financing by the Securities and Exchange Commission (App. C, 89); (2) that the facilities authorized should not be used for the transportation or sale of natural gas, subject to the jurisdiction of the Commission, unless Michigan-Wisconsin submitted to the Commission within six months after the issuance of a certificate a schedule of rates and charges in a form satisfactory to the Commission, providing for adequate and reasonable rates and charges consistent with the public interest (App. C, 90-91).[8] The order imposed the further condition that

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[7] The certificate did not, however, authorize construction or operation of 140 miles of pipeline extending from the Austin Storage Field to Detroit or other facilities proposed to be constructed by Austin Company or Michigan Consolidated. Instead, it provided as a condition of its granting that these companies file applications for authority to construct these facilities. Such applications were subsequently filed by Austin Company and Michigan Consolidated. FPC Docket Nos. G-834, 839.

A further application was filed by Michigan Consolidated at Docket No. G-918 for authority to construct and operate certain facilities which, together with the Austin-Detroit line, would enable it to store gas in the Austin Storage Field for subsequent withdrawal for distribution in Detroit. Certificates authorizing the construction and operation of facilities required to enable Michigan Consolidated so to store gas received from Panhandle were issued on November 13, 1947.

[8] This condition was modified by the Commission's order of May 6, 1947, by removing the requirement that rate sched-

"the facilities * * * authorized shall not be used for the transportation or sale of gas to * * * Michigan Consolidated * * * for resale in Detroit and Ann Arbor except with due regard to the rights and duties of Panhandle Eastern in its established service for resale in Detroit and Ann Arbor, Michigan, under its presently existing contract with Michigan Consolidated, and in accordance with the provisions of the Natural Gas Act * * *" (App. C, 91). The order provided that Panhandle's rights and duties were to be determined by supplemental order of the Commission,[9] and the Commission specifically reserved jurisdiction to reopen these proceedings, if need be, for the purpose of such determination (App. C, 91).[10]

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ules be submitted within six months after the issuance of the certificate, and requiring instead that such rates be filed prior to the use of the authorized facilities for the transportation or sale of natural gas (App. C, 226, 227). This order also corrected certain incidental errors contained in the order of November 30.

[9] This supplemental order was originally intended to be issued in 15 days. By order of December 14, 1946 (App. C, 93-94), the time for issuing such supplemental order was extended to 30 days.

[10] Notwithstanding the further provision of the order, that for the purpose of computing time within which application for rehearing may be filed, the date of the issuance of the order was to be deemed the date of the issuance of the opinions, or of the supplemental order, whichever is the later (App. C, 92), Panhandle on December 27, 1946, applied for rehearing of the order and a stay thereof (App. C, 11), and on January 10, 1947, sought rehearing of the Commission's orders of December 30, 1946, and January 3, 1947 (App. C, 12). The Commission on January 14, 1947, denied these petitions for rehearing without prejudice to filing of other such

On February 7, 1947, the Commission issued its Opinion No. 147 dated January 17, 1947, in which it made additional (and more detailed) findings in support of its order of November 30, 1946 (App. C, 113-158).

Order of February 20, 1947. The Commission, on December 30, 1946, modified its order of November 30, and reopened the record for the limited purpose of receiving further evidence with respect to the determination of Panhandle's rights in accordance with the provisions of that order (App. C, 99-106). On January 3, 1947, it set the reopened case down for hearing (App. C, 107).

The hearing was held on January 15-17, 1947. On March 12, 1947, the Commission issued its supplemental order dated February 20, 1947 (App. C, 200-201), determining Panhandle's rights and duties in the Detroit area, which order was supported by Supplemental Opinion No. 147-A, also dated February 20, 1947 (App. C, 179-199). The

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applications within 30 days from the issuance of the opinion or of the supplemental order contemplated in the order of November 30, 1946, whichever was later (App. C, 109-111). Panhandle thereafter, on February 7, 1947, filed a petition for review in the United States Court of Appeals for the District of Columbia (No. 9482), seeking review of the Commission's order of November 30 and the several related orders covered by its petitions for rehearing. This petition for review was dismissed by the Court of Appeals, on its own motion "without prejudice, however to the right of petitioner to petition for review of the order of November 30, 1946, after it shall become final by the issuance of a supplemental order or orders making same final." This Court denied Panhandle's petition for a writ of certiorari. 332 U.S. 762.

supplemental order imposed on Michigan-Wisconsin's certificate the following additional conditions:

> (1) That Panhandle is permitted to deliver natural gas to Michigan Consolidated in accordance with the terms and conditions of its existing contracts during the life of such contracts, and
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> (2) That upon the termination of such contracts, and upon mutually satisfactory terms, Panhandle is afforded reasonable opportunity to deliver and sell to Michigan Consolidated not less than the annual volumes of gas delivered and sold by it for either the years 1942 or 1945 or the average delivered for the five-year period 1942 through 1946. Further, Panhandle shall have the right to participate in the future growth of the Detroit and Ann Arbor markets by being given the opportunity to deliver and sell such additional volumes of gas to Michigan Consolidated as the latter may require in excess of the volumes of gas then being contractually purchased by it from Panhandle and Michigan-Wisconsin, in order to maintain adequate service to consumers in the Detroit and Ann Arbor districts. (App. C, 200-201)

The order provided that these conditions were imposed without prejudice to the filing of applications by either Panhandle, Michigan-Wisconsin, or Michigan Consolidated for their modification or termination, provided, however, that Panhandle's pattern of service as outlined should not in any manner be affected by the Commission's action upon such application so long as Panhandle was

able and willing to maintain adequate service in conformance therewith (App. C, 201).

On April 10, 1947, Panhandle applied for rehearing of each of the orders and opinions of the Commission in the proceeding (App. C, 14), which was denied by operation of law after the lapse of 30 days without Commission action thereon.

Proceedings in court below. On July 2, 1947, Panhandle sought review of the order of November 30 and related orders of the Commission in the United States Court of Appeals for the District of Columbia (App. C, 1-83). After review of these orders in light of Panhandle's objections thereto, the court below affirmed (App. A, 50-55). It held that the Commission's findings of fact support the conclusion that the Michigan-Wisconsin project is required by "public convenience and necessity," and in turn are supported by substantial evidence (App. A, 52-53). It pointed out that findings as to Panhandle's ability or willingness to supply the Detroit area are not required by statute, and in any case, the court noted, the Commission did make findings substantially to that effect (App. A, 52, 54). In addition, the court commented, the Detroit area is not the only market involved, and the Commission rightly took into account the interests of the other communities now served by Panhandle and of those which Michigan-Wisconsin proposed to serve (App. A, 54). In regard to Panhandle's contention that it had by virtue of certificates already issued it, a vested right exclusively to serve

the Detroit area, the court held that no such exclusive right is granted by the Natural Gas Act (App. A, 54).

The court further held that the Commission's finding that Michigan-Wisconsin is "able and willing properly to do the acts and to perform the service proposed" is also supported by substantial evidence. In addition, it pointed out that although no findings as to financial ability or satisfactory rate schedule are required by the Act, the Commission did find, on sufficient evidence, that Michigan-Wisconsin had submitted reasonable proof of the financial and economic feasibility of its project. (App. A, 53). And in any case, the conditioning of the certificate on the securing of SEC approval of the proposed plan of financing and on submission to the Commission of satisfactory rate schedules prior to the operation of the proposed pipeline was "both practical and legal" (App. A, 53-54). As to Panhandle's contention that its rights to serve the Detroit market had been cut to a volume below that which it was delivering under valid certificates, the court pointed out that the Commission expressly denied any such intention and that the certificate contained provisions affirmatively protecting Panhandle's interests (App. A, 55). Finally, the court found "no adequate basis for Panhandle's criticism of the procedure that was followed or its charge of bias against certain members of the Commission" (App. A, 55).

ARGUMENT

The Commission, on November 30, 1946, issued a conditional certificate of public convenience and necessity to Michigan-Wisconsin, authorizing it to build and operate a pipeline for the transportation of natural gas from the Hugoton Field in Texas to various points in Wisconsin, Missouri, Iowa, and Michigan. In its order, the Commission found, as required by Section 7(e) of the Natural Gas Act, as amended, that the proposed construction and operation of these facilities by Michigan-Wisconsin are required by public convenience and necessity, and that Michigan-Wisconsin is able and willing properly to do the acts and to perform the service proposed. These findings were supported by subsidiary findings of fact, which, as the court below found, are supported by substantial evidence (App. A, 53).

Panhandle does not attack the Commission's order in so far as it authorizes Michigan-Wisconsin to serve new areas in Wisconsin, Missouri, and Iowa, nor does it deny that additional service is required in the Detroit area which it serves. See App. C, 147. The nub of its position is that the Commission erred in granting authority to Michigan-Wisconsin to construct and operate the additional facilities needed to serve the Detroit area. The various contentions on which Panhandle relies in support of this position have already been considered and, we submit, properly rejected by the court below.

1. (a) There is no general principle of law encrusted on the concept of "public convenience and necessity" requiring, as petitioner suggests (Pet. 20-29), that no certificate should be issued to a new supplier, unless and until the present supplier has been first given an opportunity to furnish such additional service as may be required. Such a requirement, if it existed as a principle of law, would for all practical purposes assure to the present supplier an exclusive monopoly of his area of service. Not only does such a principle not exist, but, on the contrary, it is established that even in a regulated industry the competition of a new supplier is frequently desirable in the public interest. *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 532; *ICC* v. *Parker,* 326 U. S. 60; *Davidson Transfer & Storage Co.* v. *United States,* 42 F. Supp. 215, 219 (E. D. Pa.), affirmed, 317 U. S. 587; *Lang Transp. Corp.* v. *United States,* 75 F. Supp. 915 (S.D. Cal.). But even the desirability of competition is, at most, merely one of the many factors which the Commission considers in determining whether in the particular case the issuance of a certificate would be in the public interest.

As pointed out by the court below, "nothing in the Natural Gas Act suggests that Congress thought monopoly better than competition or one source of supply better than two, or intended for any reason to give an existing supplier of natural gas for distribution in a particular community the privilege of furnishing an increased supply"

(App. A, 54). This is true both as to certificates of public convenience and necessity issued pursuant to Section 7(e) of the Natural Gas Act, as amended (*Kentucky Natural Gas Co.* v. *Federal Power Commission,* 159 F. 2d 215, 217-218 (C.C.A. 6); *Arkansas Louisiana Gas Co.* v. *Federal Power Commission,* 113 F. 2d 281, 282 (C. C. A. 5)),[11] and as to those issued under Section 207(a) of the Motor Carrier Act of 1935 (49 Stat. 551, 49 U. S. C. 307(a)) on which Section 7(e) of the Natural Gas Act is based.[12] *ICC* v. *Parker,* 326 U. S. 60; *Chesapeake & Ohio Ry. Co.* v. *United States,* 283 U. S. 35, 42; *Lang Transp. Corp.* v. *United States,* 75 F. Supp. 915, 928-930; cf. *McLean Trucking Co.* v. *United States,* 321 U. S. 67; *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. F. Ry.,* 270 U. S. 266, 273.

Finally, as noted by the court below (App. A,

[11] Although the *Arkansas Louisiana* case involved the Section 7(c) which was in effect prior to the 1942 amendment, that section, as it then read, required certificates of public convenience and necessity only in regard to "the construction or extension of any facilities for the transportation of gas to a market in which natural gas is already being served by another natural-gas company." 52 Stat. 821, 825. And it is amply clear from the legislative history of the 1942 amendment which required such certificates for all construction of natural gas facilities that Congress did not intend to withdraw the authority previously vested in the Commission. See H. Rep. 1290, 77th Cong., 1st sess., p. 4; Hearings, House Committee on Interstate and Foreign Commerce, 77th Cong., 1st sess. on H. R. 5429, p. 15. This intention is explicitly declared in Section 7(g) of the 1942 amendment. Appendix, *infra,* p. 29.

[12] See H. Rep. 1290, 77th Cong., 1st sess., pp. 2-3, Hearings, *supra,* p. 82.

54), Panhandle's claim of exclusive privilege is specifically negatived by Section 7(g) of the Natural Gas Act which provides that "Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company." Accordingly, the fact that Michigan-Wisconsin will serve the Detroit area, along with Panhandle, does not violate any rights conferred upon Panhandle by virtue of the certificates already issued it, and, hence, does not of itself invalidate the Commission's order.

(b) The Commission has broad discretion in passing on questions of public convenience and necessity; it must balance the conflicting elements and in the exercise of its discretion arrive at a conclusion. Its conclusion in this case, that the pipeline proposed by Michigan-Wisconsin was required by public convenience and necessity, was, we submit, entirely proper. In the first place, Michigan-Wisconsin's proposed pipeline would serve several areas not now receiving natural gas but where a substantial demand exists therefor. "A combined population of more than 1,388,000 people will for the first time secure the benefits to be derived from the introduction of natural gas service in the communities in Wisconsin, Iowa and Missouri" (App. C, 151). In the second place, Michigan-Wisconsin's proposed service will make available to the Detroit market an alternative service and supply of natural gas from the areas of the largest gas

reserves in the United States. "Such an independent additional and reliable source of supply will be of great value to the area to be served and benefit public convenience and necessity" (App. C, 153).[13] And finally, although it recognized that Panhandle was already supplying the Detroit area with part of its natural gas requirements, the Commission found that Panhandle had not applied for sufficient facilities nor demonstrated its ability to serve adequately the needs of the Detroit area.

This latter finding, petitioner to the contrary notwithstanding (Pet. 25), is supported by the Commission's basic findings. Although Panhandle has long range plans, which it claims will meet all the Detroit requirements (Pet. 11-12), its existent facilities were concededly inadequate to supply the demands (App. C, 147), and there was pending before the Commission at this time, only its application for its so-called "B" facilities, which the Commission authorized contemporaneously with the issuance of Michigan-Wisconsin's certificate (see, *supra, fn.* 6, p. 6).[14] It is clear that the installa-

[13] The Commission simultaneously noted that the Pittsburgh and the Southern California areas also have alternative services and sources of natural gas. App. C, 153, fn. 17.

[14] By its so-called "B" facilities, Panhandle proposed to add 80,000 Mcf to its rated daily capacity. It's "C" facilities would, it claimed, add 106,000 Mcf and its "D" facilities 145,000 Mcf. See Pet. p. 10. No application for the "C" or "D" facilities was on file with the Commission during the pendency of this proceeding before it. In this regard, it may also be noted that inasmuch as the "D" facilities would involve the construction of a new pipeline, peti-

tion of the "B" facilities alone would not be ample to meet the Detroit requirements, and that any large increase in the volume of natural gas supplied to the Detroit area by Panhandle, would have to be at the expense of other communities, where a natural gas deficiency also exists [15] (App. C, 86, 194). "Obviously whether facilities to provide the enlarged capacity will actually be presented to, or authorized by, the Commission and, if approved, when they might be placed in the public service, or where such gas might be delivered, is, to say the least, conjectural" (App. C, 190).[16] The Commission was not required by "public convenience and necessity" to deny Michigan-Wisconsin's application in deference to the possibility that Panhandle planned in the future adequately to increase its service.[17]

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tioner's further contention, that permitting Michigan-Wisconsin to build a new pipeline to supply to Detroit area will result in "uneconomic extensions" and "economic waste" (Pet. 24), is patently unsound (See App. C, 145-146).

[15] In its opinion, the Commission commented that if "Panhandle discontinued its sales in the Detroit and Ann Arbor areas after December 31, 1951, its present and future demands and other available markets will readily absorb the quantities of gas now sold to Michigan Consolidated" (App. C, 193).

[16] Panhandle filed an application for the "C" facilities on March 5, 1947, and a certificate was granted on June 10, 1948, several days after the decision below. *Re Panhandle Eastern Pipe Line Company*, FPC Docket No. 876. No application for the "D" facilities has ever been filed.

[17] In addition to the fact that Michigan-Wisconsin offered a more immediate prospect of solving the Detroit problem than Panhandle, the Commission in its opinion noted that the

(c) Nor did the Commission's order infringe on any of Panhandle's "rights" accruing by virtue of the fact that it was already rendering service to the Detroit area, for, as we have already pointed out, Panhandle had no right to serve the Detroit area exclusively. Moreover, the order of November 30 provided that the certificate to be issued to Michigan-Wisconsin should contain provisions for the affirmative protection of Panhandle[18] (App. C, 91). The supplemental order of February 20, 1947, issued after further hearings on this matter,[19] dealt solely with the scope of Panhandle's existent service in the area, and not only expressly preserved to Panhandle, as its minimum rights after the expiration of its contact with Michigan Consolidated, its existent pattern of service, but

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proposed project has a distinct advantage over the ordinary pipeline system, such as Panhandle's, in that the project combines the operation of a high pressure pipeline with the utilization and operation of large gas fields for underground storage purposes. This combination of transport and large scale storage facilities makes possible important economies in operation, permits flexibility and superior reliability of service and enables a high load factor operation of the main pipeline system (See App. C, 121).

[18] The Commission ordered that Panhandle should have "reasonable opportunity to deliver and sell to Michigan Consolidated *not less than* the annual volumes of gas delivered and sold by it for either the years 1942 or 1945 or the average delivered for the five-year period 1942 through 1946" [italics supplied] (App. C, 201). *Supra*, p. 11.

[19] At this hearing, Panhandle stood on its original contention that it was entitled to the exclusive right to serve the Detroit area. It did not submit any witness and declined to state its views in regard to the acceptability of the new contract proferred by Michigan Consolidated (App. C, 197).

provided that Panhandle "shall have the right to participate in the future growth of [these] markets" (App. C, 201). In addition, the supplemental order provided a means whereby Panhandle may apply for a modification of this order, a means which Panhandle has not sought to invoke (App. C, 201). Thus, there accordingly is clearly no reviewable question raised by Panhandle's contention that the Commission improperly cut its rights in the Detroit market "to a volume below that which it is delivering under valid certificates" or that there was a taking of Panhandle's property without just compensation or due process of law (Pet. 34-38).

2. Petitioner's attack upon the Commission's findings, made pursuant to Section 7(e), that Michigan-Wisconsin "is able and willing properly to do the acts and to perform the service proposed" is similarly without merit. Petitioner urges that there was no finding as to Michigan-Wisconsin's ability to finance the project, or as to a satisfactory rate schedule, both of which petitioner urges are required as a matter of law (Pet. 29-34). But, as the court below points out, "the Act does not require such findings" (App. A, 53). See, *e.g., Tennessee Gas & Transmission Co.*, 3 F.P.C. 574; *Cities Service Transportation & Chemical Co.*, 3 F.P.C. 598. Findings on these matters are not statutory prerequisites to the issuance of a certificate, but, as in the case of "public convenience and necessity" (*supra*, p. 15), are elements among others which

the Commission considers in determining whether the applicant is "able and willing."

In any case, the Commission did find that Michigan-Wisconsin had submitted reasonable proof of the financial and economic feasibility of the project (App. C, 86), *supra,* p. 7. Further, it must be remembered that Michigan-Wisconsin is a subsidiary of a "public utility holding company" subject to the Public Utility Holding Company Act (see *supra,* p. 3, fn. 2) and hence SEC approval of its financing is mandatory. Accordingly, in view of SEC Rule U-50, which requires competitive bidding in such financing, thereby preventing the securing of a firm advance commitment, the Commission conditioned its grant of a certificate on the requirement, among others, that Michigan-Wisconsin "shall obtain approval of its proposed plan of financings by the Securities and Exchange Commission"[20] (App. C, 89). The imposition of such conditions is expressly authorized by Section 7(e), and in the circumstances of this case, was, we submit, "both practical and legal" (App. A, 53).

As to the rate schedules, the Commission in its opinion discussed both the proposed rates (App. C,

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[20] In its opinion, the Commission set out the proposed capital structure, which it implicitly indicated was satisfactory to it (App. C, 138-149).

On December 31, 1947, the Securities and Exchange Commission approved the purchase for $25,000,000 of 250,000 shares of Michigan-Wisconsin common stock by its parent company, American Light & Traction Co. Holding Company Act Release No. 7951.

132-134) and the project costs and revenues (App. C, 135-138) which ultimately are the basis on which over-all rates are set. But in view of the unusual form of rate proposed, the Commission thought further study necessary to determine whether the proposed rates or some other form of rates would assure the lowest reasonable ultimate consumer charges (App. C, 134). Accordingly, the Commission, as it has done in other cases (see *e. g., United Gas Pipe Line Co.*, 4 F.P.C. 307; *Tennessee Natural Gas Lines, Inc.*, 4 F.P.C. 1127), further conditioned the certificate by the provision that the facilities not be used "unless *** [Michigan-Wisconsin] submits *** a schedule of rates and charges in a form satisfactory to this Commission, providing for adequate and reasonable rates and charges consistent with the public interest" (App. C, 90-91). *Supra*, p. 8, and fn. 8. In this way, the Commission, as the legislative history of Section 7 suggests, is assured of an opportunity to scrutinize the characteristics of the rate structure before the certificate becomes absolute. H. Rep. No. 1290, 77th Cong., 1st sess., pp. 2-3; S. Rep. No. 948, 77th Cong., 2d sess., pp. 1-2.

3. The court below properly found that there was "no adequate basis for Panhandle's criticism of the procedure that was followed or its charge of bias against certain members of the Commission" (App. A, 55). The "private conferences" held by two of the majority commissioners with Michigan-Wisconsin officials, of which petitioner complains

(Pet. 39), were only a part of the over-all series of conferences held by these commissioners looking toward an amicable settlement of the controversy between Panhandle and Michigan-Wisconsin (see Pet. 39-40). Petitioner admits that these commissioners also conferred privately with its representatives, and that at some conferences representative of both companies were present (Pet. 40, fn. 37). The use of such informal procedures for the settlement of cases by mutual consent has been approved repeatedly.[21] See, *e.g.*, Final Report of the Attorney General's Committee on Administrative Procedure Relative to Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st sess., pp. 35-42, 180 (Federal Power Commission); Monograph on the Securities and Exchange Commission, S. Doc. No. 10, Part 13, 77th Cong., 1st sess., pp. 41-42. Moreover, petitioner in its petition for rehearing before the Commission failed to raise this point. Cf. *Panhandle Eastern Pipeline Co.* v. *Federal Power Commission,* 324 U. S. 635, 645, 649, 650-651.

Nor were the proceedings unduly expedited. It is undeniable that reasonable expedition was de-

[21] The absence of any Commission bias against petitioner is indicated by the fact that the Commission had not denied any of its applications for increased capacity in an endeavor to solve its problem of meeting present firm gas demands, aside from interruptible and direct industrial sales (App. C, 147). Simultaneously with the order here involved, the Commission granted Panhandle's application for its "B" facilities and thereafter authorized its "C" facilities. *Supra,* p. 6, fn. 6; fn. 16, p. 19.

sirable in view of the serious gas situation in the Detroit area. Moreover, Panhandle does not claim that it was prevented from introducing all evidence which it deemed appropriate. The hearing itself consumed 106 actual hearing days spread over a period of seven months. Panhandle filed three motions to dismiss, all predicated on substantially the same grounds which it urged below and on which it here relies, and the Commission held a special hearing on the first of these motions in connection with which Panhandle filed a detailed brief. See *supra,* p. 6. Although only a short period was allowed to prepare for oral argument, the oral argument itself consumed four days, supplementary to which Panhandle filed another brief. All these circumstances clearly demonstrate, we submit, that Panhandle was not denied a fair hearing. Cf. *Phillips* v. *Securities and Exchange Commission,* 153 F. 2d 27, 32 (C.C.A. 2), certiorari denied, 328 U. S. 860.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. We respectfully submit that the petition for a writ of certiorari should be denied.

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APPENDIX

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended by 56 Stat. 83, 15 U.S.C. 717 *et seq.*, are as follows:

Sec 7.

* * * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall enage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service,

sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

* * * * *

Sec. 15. (a) Hearings under this Act may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation

in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this Act shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this Act.

* * * * *

Sec. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which

the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if

any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

☆ U. S. Government Printing Office, 1948 J807201/142